

FAN TOKENS AND CRYPTOASSETS: NEW AND FUN BUT NOT A CONSUMER LAW FREE ZONE IN AUSTRALIA

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Legal Briefings - By **Sue Gilchrist, Steve Wong and Byron Turner**

Businesses involved in advertising cryptoassets and related products to a consumer audience should consider any exposure to consumer protection laws and advertising regulations.

TAKEAWAYS

As cryptoassets continue to be marketed to consumers, for example in the form of utility tokens or "fan tokens", there will be increasing attention by regulators and competitors on these marketing activities. The ACCC has recently highlighted advertising in the digital economy as an enforcement priority for the upcoming year. Businesses involved in the marketing of cryptoassets and related products will need to consider marketing strategies in light of consumer protection laws and advertising regulations. This will present a challenge in appealing to the target audience whilst also acknowledging the complexity of cryptoassets as investment products.

MARKETING OF CRYPTOASSETS IN AUSTRALIA

A recent [case study](#) involving Arsenal fan tokens gives an insight into the types of considerations facing businesses and consumers in relation to the marketing of cryptoassets in Australia. As in the UK, in Australia cryptoassets are not the subject of specific financial regulation. However, the complexity of these products is such that failure to disclose investment risks may be viewed as "[taking] advantage of consumers' inexperience...in cryptoassets", which may fall foul of consumer protection laws and advertising regulations.

In particular, the ACL contains many protections that are capable of being applied to the marketing of cryptoassets to consumers, including misleading and deceptive conduct, particularly where businesses fail to disclose material information regarding cryptoassets in any marketing materials. Businesses marketing cryptoassets will therefore need to be mindful of their exposure to liability under the ACL, especially as the ACCC has recently highlighted advertising in the digital economy as an enforcement priority for the upcoming year.

BACKGROUND

Cryptoassets are defined broadly as capturing digital assets that use cryptography and distributed ledger (i.e. blockchain) or similar technology. From their genesis, through the peaks and troughs of the hype cycle, cryptoassets have developed as a genuine asset class, both for investors and collectors. As applications continue to develop beyond core use cases, for both cryptoassets and the technologies that support them, including blockchain, the target market for these assets has shifted towards the consumer sector. From non-fungible tokens (NFTs) in sporting highlight reels to collectible digital artwork, the originators of cryptoassets are cashing in on consumer interest in these assets as products, as well as investments. A recent example in Australia that [HSF advised on is Treasury Wines Estates'](#) launch of limited release NFTs tied to a rare Penfolds Magill Cellar 3 barrel of wine.

The lack of specific regulation governing cryptoassets is also well-documented. In Australia, cryptoassets are not universally recognised as financial products governed by key regulators, including ASIC and the ACCC, and so any regulation remains ad hoc despite ongoing discussion with industry stakeholders. The absence of specific regulation leaves a potential void for the exploitation of consumers, particularly due to the complexity of cryptoassets and the markets on which they are traded. However, existing general consumer protection laws and advertising regulations remain capable of being adapted for application to cryptoassets to address such issues.

CONSUMER LAW AND CRYPTOASSETS

The Australian Consumer Law (**ACL**) governs the operations of businesses in their dealings with consumers. In this respect, cryptoasset offerings targeted at consumers will need to comply with the ACL, including the extensive protections against misleading and deceptive conduct, false or misleading representations and unfair contract terms. The ACCC is the regulator responsible for enforcing the ACL, although competitors, consumers and other affected parties can also bring actions under the consumer protection provisions of the ACL. Relevantly, the ACCC has recently highlighted manipulative or deceptive advertising in the digital economy as an enforcement priority for 2022/2023.

Where a cryptoasset is deemed to be a financial product, determined based on factors including the nature of the rights attached to the cryptoasset, consumer dealings in relation to these products may also be subject to financial regulation and enforcement by ASIC. For example, protections under the *ASIC Act 2001* (Cth) against misleading and deceptive conduct and false and misleading representations may apply, as well as similar provisions under the *Corporations Act 2001* (Cth).¹

A further consideration in the marketing of cryptoassets to consumers is any applicable advertising standards. In Australia, the advertising and marketing communications industry is self-regulated and managed through a body called Ad Standards. Advertisers are expected to adhere to a Code of Ethics and various other advertising codes.

In the UK, the Advertising Standards Association (ASA) is an independent regulator, with broad powers to regulate the content of advertisements, sales promotions and direct marketing in the UK. These powers have been put to use in a string of cases in the UK involving marketing of cryptoassets.

A case study in "fan tokens", which by nature are designed for consumers given the underlying benefits associated with the tokens, involving Arsenal Football Club shows the risks of "trivialising" cryptoassets for marketing purposes, particularly given their complexity and potential as investment products.

CASE STUDY - ARSENAL FC FAN TOKENS (\$AFC)

Fan tokens are a type of cryptoasset that can be purchased by fans (eg of a sports team) and permit their holders to access a variety of fan-related membership perks such as voting on club decisions, rewards, merchandise designs and unique experiences. A recent example in Australia was the Formula 1 fan token released for the Australian Grand Prix in April 2022, which offered tiered access to exclusive fan experiences.

Globally, Socios is a primary player in the fan token market, offering utility tokens and wallet services, and also providing a marketplace for the trading of those tokens. Its primary offering relates to sports fan tokens, having partnered with many major sporting organisations, including Barcelona FC, AC Milan and Arsenal FC.

Arsenal Football Club plc (**Arsenal**) partnered with Socios to provide the '\$AFC Fan Token', as well as a digital platform (via the Socios app) for fan engagement, where fans could interact and collect tokens to influence and engage with club decisions.

In December 2021, the UK Advertising Standards Association called out Arsenal for misleading advertising in relation to the tokens.² The complaint centred around various marketing materials, including:

1. a Facebook video post in August 2021, that stated "\$AFC in now live \$CHZ" and "[Arsenal players] Ben White, Calum Chambers and Kieran Tierney have had their say ... But what song do you want to hear when we win? Download the Socios app to get your token and vote"; and

2. a website titled "\$AFC Fan Token: Everything you need to know" that included information explaining the Arsenal Fan Token and the underlying benefits.

The ASA complaint was that the advertisements were misleading, alleging a failure to highlight investment risks and to give sufficient detail about the nature of the tokens, which in fact could only be obtained by exchanging with another cryptocurrency that needed to be purchased separately. ASA also claimed the advertisements were irresponsible in taking advantage of consumer inexperience with cryptoassets.

Arsenal gave a number of responses to the complaint, including, primarily:

- the advertisements were not **irresponsible**, as the tokens were not marketed as financial products, with the focus being on the benefits underlying the tokens, including fan engagement and club voting rights. Arsenal also argued that fan tokens are materially different to genuine cryptoasset investment products, such as cryptocurrencies, as they are primarily concerned with fan engagement rather than being a medium of exchange; and
- the advertisements were not **misleading**, as their purpose was to educate fans about the tokens, rather than promote the tokens as tradeable or for capital gain. In Arsenal's view, no warnings were therefore required of the investment risks associated with purchase of the tokens. Arsenal further argued that the relationship between fan tokens and cryptocurrency was well known by the target audience, being followers of the Arsenal Facebook page.

ASA ultimately upheld the complaint on all grounds. In finding that the advertisements were **irresponsible**, it took into account guidance from financial regulators in the UK that classed redeemable utility tokens as cryptoassets and a form of investment product. Despite the lack of specific financial regulation of these products, their complexity warranted further information being provided, with the advertisements considered to have "trivialised investment in cryptoassets".

On a similar basis, the advertisements were held to be **misleading** due to a failure to give warnings of the associated investment risks, including the risk that the value of the tokens could go down as well as up, and also that cryptoassets were unregulated in the UK. The fact that the tokens could only be obtained by exchanging with another cryptocurrency that needed to be purchased separately was material information that should have been disclosed.

On this basis the advertisements were found to breach various provisions of the non-broadcast advertising code.

The Arsenal complaint was one of a string of similar complaints brought by the ASA in 2021 and 2022, including complaints against Coinbase Europe Ltd and eToro (UK) Ltd, prompting the ASA to subsequently release a guideline in March 2022 on the promotion of cryptoassets in advertising.³

The ACL contains many protections that mirror the basis for the ASA's complaints regarding the improper marketing of cryptoassets to consumers, including prohibitions against misleading and deceptive conduct. Given the broad range of conduct in trade or commerce to which these protections apply, the ACL is capable of applying to similar conduct in Australia.

1. See eg *Corporations Act 2001* (Cth) ss 1041E, 1041F, 1041H.
2. A21-1121873 Arsenal Football Club plc
(<https://www.asa.org.uk/rulings/arsenal-football-club-plc-a21-1121873-arsenal-football-club-plc.html>).
3. ASA, 'Cryptoassets', Advice online (10 March 2022)
(<https://www.asa.org.uk/advice-online/cryptoassets.html#What%20is%20a%20cryptoasset>).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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